

**New Yorkers for Students' Educ. Rights
("NYSER) v State of N.Y.**

2014 NY Slip Op 32151(U)

August 8, 2014

Supreme Court, New York County

Docket Number: 650450/14

Judge: Manuel J. Mendez

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MANUEL J. MENDEZ Justice

PART 13

NEW YORKERS FOR STUDENTS' EDUCATIONAL RIGHTS ("NYSER), RUBNELIA AGOSTINE, MIRIAM ARISTY-FARER, KATHRYN BARNETT, AVA CAPOTE, MILAGROS ARCIA, G. CHANGLERTH, MONA DAVIDS, ROLANDO GARITA, SARA HARRINGTON, SONJA JONES, NICOLE IORIO, HEIDI MOUILLESSEAU-KUNZMAN, GRETCHEN MULLINS-KIM, ELLEN TRACHTENBERG, HEIDI TESKA-PRINCE and ANDY WILLARD,

Plaintiff

- Against-

THE STATE OF NEW YORK, ANDREW M. CUOMO, as Governor of the State of New York, NEW YORK STATE BOARD OF REGENTS, and JOHN B. KING, Jr., as President of the University of the State of New York, and Commissioner of Education,

Defendant.

INDEX NO. 650450/14

MOTION DATE 07-29-2014

MOTION SEQ. NO. 003

MOTION CAL. NO.

The following papers, numbered 1 to 5 were read on this motion for change of venue of the motion for the preliminary injunction and the underlying matter.

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits

Replying Affidavits

PAPERS NUMBERED

1-2

3-4

5

Cross-Motion: Yes X No

Upon a reading of the foregoing cited papers, it is ordered that this motion for a change of venue is granted solely to the extent of Transferring Venue of Plaintiff's motion for a Preliminary Injunction from New York County to Albany County, the remainder of the motion is denied.

Plaintiff, an unincorporated association consisting of individuals, organizations and parents of schoolchildren in nine districts in New York State commenced this action to challenge New York State's funding of education. The complaint filed on February 10, 2014, was subsequently amended in March 28, 2014. Plaintiffs seek declaratory and injunctive relief compelling defendants to implement statutory and budgetary changes to the state's education system, as well as nullifying the gap elimination adjustment, the cap on state aid increases, the requirements regarding increases in local property tax levies and the aid withholding provisions of L.2012, Ch.57, Part A, § 1 and L.2013, Ch. 57, Part A, § 1.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

On May 30, 2014 defendants moved to dismiss the amended complaint. On June 24, 2014 plaintiffs moved for a preliminary injunction. On June 30, 2014 defendants served plaintiff's counsel with a demand for change of venue seeking to transfer the case from New York County to Albany County. On July 7, 2014 plaintiff responded to defendants' demand asserting that venue was proper in New York County because some of the individual named plaintiffs reside in New York County. Plaintiff did not change venue and defendants on July 8, 2014 moved (1) to transfer venue of the motion for a Preliminary injunction and the underlying action to Albany County; (2) to stay all further proceedings pending resolution of this motion; and (3) extending defendants' time to respond to plaintiffs' motion for a preliminary injunction.

Defendants base their motion to transfer venue on CPLR § 6311(1) which states: "... A preliminary injunction to restrain a public officer, board or municipal corporation of the state from performing a statutory duty may be granted only by the supreme court at a term *in the department* in which the officer or board is *located* or in which the duty is required to be performed."

Defendants argue that in this action the officers or board are located, and the duty is required to be performed, in Albany County, thereby warranting changing venue to Albany County. Furthermore, since there is considerable overlap in the issues to be decided on the Preliminary Injunction and the underlying action, in the interest of judicial economy the underlying action should also be transferred to Albany County.

Plaintiffs argue that the motion for a Preliminary Injunction only seeks to enjoin the State and Governor and that the State and Governor are located, for purposes of the statute, in New York County where they maintain an office at 633 Third Avenue New York, N.Y. 10017. Plaintiffs argue that this is a matter of statutory interpretation, that the plain meaning of the statute refers to "location" and not "principal office or principal place of business" as do other venue statutes. Finally plaintiffs argue that they are residents of New York County, have chosen New York County as the place of trial and the court should not disturb the plaintiff's choice of forum. Defendants argue that only CPLR§ 6311(1), and not other venue statutes, apply when a party seeks to preliminarily enjoin a state officer or board,

There is scant case law on this issue, specially on the interpretation of the word "location" in the statute.

CPLR§ 6311(1) was preceded by Civil Practice Act (CPA)§879, which was preceded by Code of Civil Procedure (CCP)§ 605. CCP§ 605 required that an injunction or order to restrain a state officer or Board of officers from performing a duty imposed by statute be granted by the Supreme Court at a General Term thereof, sitting *in the department* in which the officer or Board is *located*, or the duty is required to be performed. The Court of Appeals held that "the inhibition of the statute is jurisdictional, and an order not granted as prescribed is a nullity." (see Matter of People ex rel. Derby v. Rice, 84 Sickels 461, 129 N.Y.461, 29 N.E. 358 [1891])

CPA§879 only applied to temporary injunctions and had no application with respect to final injunctions incidental to other relief as to which the supreme court has inherent power (*E.P. Lawrence Co., Inc., v. Browne*, 266 A.D.183, 41 N.Y.S.2d 804 [1st. Dept. 1943] reversing transfer of action to Albany County when injunction was not for temporary but for final relief; *New York Central Railroad Company v. Lefkowitz*, 12 N.Y.2d 305, 189 N.E.2d 695, 239 N.Y.S.2d 341 [1963]). A motion to preliminarily enjoin a State Officer or Board under CPA §879 had to be brought *in the department* where the State Officer or Board is *located* or the Duty is required to be performed. Some cases have held that "The State Officer of Board is located, for purposes of this statute, where the State Officer or Board has its principal office, and the duty is to be performed where the determination is made." (*Queens-Nassau Transit Lines, Inc., v. Maltbie*, 183 Misc. 924, 51 N.Y.S.2d 841 [Sup. Ct. N.Y. 1944]).

In a situation in which this section [CPA §879] applied it superseded other venue statutes, so the action for declaratory judgment could be brought in the county designated by plaintiff but the motion for the preliminary injunction had to be brought where the State Officer or Board is located (*Bull v. Stichman*, 189 Misc.590, 72 N.Y.S.2d 202 [N.Y. Sup.1947] transferring venue of Preliminary Injunction motion to Albany County but retaining venue of underlying action for declaratory relief in Erie County).

CPLR§ 6311(1)which contains essentially the same language as CPA§879 and CCP§ 605 applies to Preliminary injunctions only and not to final injunctions incidental to other relief, and contains the same venue provisions as CPA§879 (see CPLR§ 6311(1); CPA§879; *New York Central Railroad Company v. Lefkowitz*, 12 N.Y.2d 305,[1963], *Supra*, finding venue proper in Westchester County and not in Albany County, although Attorney General and Public Service Commission were defendants, because injunction sought was not temporary but final and incidental to other relief).

The motion before this court is to change venue of a motion for a Preliminary injunction and subsequently if the motion is granted to also change venue in the interest of justice of the underlying action. With respect to that part of defendants' motion which seeks a change of venue of the motion for a Preliminary injunction, it is clear that they are entitled to this relief under CPLR 6311(1) as the Governor and State are located for the purposes of this statute in Albany County (*Hurlbut v. Whalen*, 58 A.D.2d 311, 397 N.Y.S.2d 586, [4th Dept. 1977]; *Queens-Nassau Transit Lines, Inc., v. Maltbie*, 183 Misc. 924, 51 N.Y.S.2d 841 [Sup. Ct. N.Y. 1944], *Supra*).

The court has considered the cases cited by plaintiffs in opposition to this motion for change of venue and finds that they are distinguishable. In *Skelos v. Paterson*,(13 N.Y.3d 141, 915 N.E.2d 1141, 886 N.Y.S.2d 846 [2009]) the Preliminary Injunction was not to enjoin a State Officer or Board but to enjoin a putative nominee from performing the duties of Lieutenant Governor and incidental to the underlying action for a Declaratory judgment that the Governor was not constitutionally authorized to appoint a Lieutenant Governor, thus the venue provisions in CPLR 6311(1) did not apply. In *Weingarten v. Board of Education of*

the City School District of the City of New York,(3 Misc.3d 418,776 N.Y.S.2d 701[N.Y. Sup. 2004]) the issue was not the applicability of CPLR §6311(1) but that of CPLR §504(2) the venue provision applicable when an action is brought against a City School District. The statute specifically states that the trial of such action shall be in the county where such school district is situated or if such district is situated in more than one county, in either county. CPLR §6311(1) does not provide that the motion for a preliminary injunction be heard in more than one county but in *the* county where the State Officer or Board *is located*, or the duty is required to be performed. The state and governor are located in Albany County which is the place where the motion for a Preliminary Injunction must be heard.

“The place of a trial shall be in the county in which one of the parties resided when the action was commenced” (CPLR § 503(a); Christomanos v. Vick, 95 A.D. 3d 461, 942 N.Y.S.2d 870 [1st. Dept. 2012]; Roman v. Brereton, 182 A.D.2d 556, 582 N.Y.S.2d 710 [1st. Dept. 1992]). The underlying case is properly venued in New York County as it is the place where at least one of the Plaintiffs resides.

Accordingly, it is hereby ORDERED that the motion for a change of venue of the motion for a Preliminary Injunction from Supreme Court New York County to Supreme Court Albany County is granted, and it is further

ORDERED that the venue of the motion for a Preliminary Injunction (motion sequence 006) is changed from this court to the Supreme Court, County of Albany, and it is further

ORDERED that within 20 days from the date of this order the moving party serve upon the Plaintiffs attorneys and the General Clerk’s Office (Room 119) a copy of this order with notice of entry, and it is further

ORDERED that the clerk is DIRECTED to transfer the papers on file in the Motion for a Preliminary Injunction to the Clerk of the Supreme Court, County of Albany upon service of a copy of this order with notice of entry and payment of the appropriate fees, if any, and it is further

ORDERED that the remainder of defendants’ motion is denied.

ENTER:
MANUEL J. MENDEZ
J.S.C.

Dated: August 8, 2014



Manuel J. Mendez
J.S.C.

Check one: FINAL DISPOSITION X NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE